FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 10 1970
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1969

No. ~~691~~ 62

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

BOIS, LAFLAMME & KALINSKI, and
MCLANE, CARLETON, GRAF, GREENE
& BROWN by
STANLEY M. BROWN,
Attorney for Respondent
40 Stark Street
Manchester, New Hampshire

TABLE OF CONTENTS

Index of Cases and Authorities i
Opinions Below 2
Question Presented 2
Statement of the Case 3
Statement of the Facts 5
1. Alphonse Roy's Reputation 5
2. Genesis of the September 10, 1960 Column 6
3. The "bootlegger" Charge was Private Factual Libel 11
Argument 12
I. The decision below correctly applied *New York Times v. Sullivan* to the facts shown 12
II. A false report of bootlegging in the 1920's, made in disparagement of a political candidate in 1960, may properly be found to be outside the boundaries of the "Official Conduct" concept of *New York Times v. Sullivan* 15
III. Appellant's prayer that this court summarily reverse the judgment below concurrent with the issuance of the writ for which application is made is improper. 21
Conclusion 32
Appendix A 33

INDEX OF CASES

Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260 (1870) 23
Baer v. Rosenblatt, 106 N. H. 26 (1964) 2, 17, 20, 26
Baer v. Rosenblatt, 108 N. H. 368 (1967) 17
Beckley Newspapers Corp. v. Hanks, 389 U. S. 81 (1967) 22
Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579 (5th Cir. 1967) cert. denied 393 U. S. 825 (1968) 18, 19
Cabin v. Community Newspapers, Inc., 27 App. Div. 2d 543, 275 N. Y. S. 2d 396 (1966) 19
Cepeda v. Cowles Magazines and Broadcasting, Inc., 392F. 2d 417 (9th Cir. 1968) cert. denied 393 U. S. 840 (1968) 27, 31
Chagnon v. Union Leader Corp., 103 N. H. 426, 174 A. 2d 825 (1961) cert. denied, 369 U. S. 830 (1962) 2

Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967) 16, 18, 22, 26
Eadie v. Pole, 91 N. J. Super. 504, 221 A. 2d 547 (1966) 19
Goldwater v. Ginzburg, 261 F. Supp. 784 (S. D., N. Y. 1966) 19, 25, 26
Keogh v. New York Herald Tribune, Inc. 51 Misc. 2d 888, 274 N. Y. S. 2d 302 (1966) 19
Lafferty v. Houlihan, 81 N. H. 67 (1923) 20
Layne v. Tribune Co., 108 Fla. 177, 146 So. 234, 86 ALR 466 (1933) 24
New York Times Co. v. Connor, 365 F. 2d 567 (5th Cir. 1966) 25, 27
New York Times Co. v. Sullivan, 376 U. S. 254 (1964) 2, 12, 13, 16, 17, 18, 19, 21, 22, 25, 27, 29, 31, 32
Palmer v. Concord, 48 N. H. 211 (1868) 20
Pearson v. Fairbanks Pub. Co., Inc., 413 P. 2d 711 (Alaska, 1966) 23
People v. Mager, 25 App. Div. 2d 363, 269 N. Y. S. 2d 848 (1966) 19
Roselle A. Roy, Executrix of the Will of Alphonse Roy v. Monitor Patriot Co. and North American Newspaper Alliance, Inc., 109 N. H. —, 254 A. 2d 832 (1969) 2
Rosenblatt v. Baer, 383 U. S. 75 (1966) 2, 17, 19, 25, 26
Roy v. North American Newspaper Alliance, Inc., 106 N. H. 92, 205 A. 2d 844 (1964) 2, 3
St. Amant v. Thompson, 390 U. S. 727 (1968) 19, 21, 25, 27, 28, 29, 31, 32
State v. Burnham, 9 N. H. 34 (1837) 14, 20, 21
Tucker v. Kilgore, 388 S. W. 2d 112 (Ky. 1964) 19

OTHER AUTHORITIES

Annot., 10 ALR 672 (1921) 23
Annot., 150 ALR 1338 (1944) 23
PROSSER, TORTS s. 110 (3d ed. 1964) 17
RESTATEMENT OF TORTS, § 578 (1938) 27
33 AM. JUR., *Libel and Slander* § 198 (1941) 23

In the

Supreme Court of the United States

OCTOBER TERM 1969

No. 891

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Respondent Roselle A. Roy, Executrix of the Will of Alphonse Roy, prays that the writ sought herein be denied since the Supreme Court of New Hampshire decided the question involved in accordance with the requirements of the Constitution of the State of New Hampshire, the Constitution of the United States, and decisions of this Court insofar as applicable.

Opinions Below

The opinion below on which the Petition is based is *Roselle A. Roy, Executrix of the Will of Alphonse Roy v. Monitor Patriot Co., North American Newspaper Alliance, Inc.*, 109 N.H.—, 254 A2d 832 (1969) and is Appendix A to the Petition. A prior transfer in the same case on another point is reported as *Roy v. North American Newspaper Alliance* in 106 N.H. 92, 205 A2d 844 (1964).

Question Presented

This is an application for Writ of Certiorari to the New Hampshire Supreme Court, to review its judgment on verdicts returned on *one count only* of a libel action involving three counts. The question suggested for review is whether the Court below correctly applied *New York Times v. Sullivan*, 276 U.S. 254, in affirming the Trial Court's submitting as a question of fact to a jury whether charging falsely in 1960 that a candidate for U.S. Senate was "a former small time bootlegger" in the 1920's was a publication entitled to qualified privilege under *New York Times*, or whether it was purely private libel beyond the boundaries of factual reporting on the "official conduct" of the candidate and hence beyond the scope of the *New York Times* strictures.

The jury found that the publication was "purely private libel" on the facts in evidence, and applied local law exemplified in *Chagnon v. Union Leader*, 103 N.H. 426, 174 A 2d 825, *cert. denied*, 369 U.S. 830 and in *Baer v. Rosenblatt*, 106 N.H. 26, 203 A 2d 773, *rev'd on other grounds* sub nominee *Rosenblatt v. Baer*, 383 U.S. 75.

In the trial of the cause, for reasons hereafter outlined, the Trial Court ruled (erroneously in our view) that the "actual malice" of the writer, the late Drew Pearson, was *not* attributable to the Petitioners, although it is now admitted for the first

time in this Court, that Pearson was the real party in interest throughout. This respondent's contentions that the Trial Court erred with regard to this aspect of the case were not ruled upon below, as being moot in light of the result reached. Since they will become relevant should the writ issue, we brief them herein.

It is the position of Respondent that the writ should not issue and that the case was disposed of below in accordance with relevant constitutional law. Should the writ nevertheless issue, Respondent suggests that there are other questions that merit review which flow from the relationship of syndicated national columnists to the publishing press and victims of defamation emanating from such sources. Respondent does not cross-file for certiorari because of the fact that the original plaintiff, Roy, and the real party in interest defendant, Pearson, and other material witnesses, have now deceased so that a new trial would serve no useful purpose.

Statement of the Case

1. *Pearson, NANA, and Monitor*:

These actions of trespass and libel were instituted in 1960 against the Monitor Patriot Co. because of its publication of the September 10, 1960 Drew Pearson column in the *Concord Monitor*, a daily newspaper published in the State capital. Monitor, being a New Hampshire corporation, was unquestionably subject to the jurisdiction of the New Hampshire court. North American Newspaper Alliance (NANA), being a foreign corporation, contested jurisdiction, but was held subject to service because it was doing business in the State, in *Roy v. North American Newspaper Alliance, supra.* Pearson, who largely wrote the column and was the original publisher (to NANA) was not sued because, being a non-resident in-

dividual, he was not amenable to process in New Hampshire. The underlying arrangement between Pearson, NANA and newspapers such as Monitor, was as follows (See 106 N.H. at 95, 96, 97-98):

> "The Pearson column was received by the defendant [NANA] in its New York office where it was stenciled and mimeographed and shipped to subscribing newspapers on the East Coast. ***The defendent acted as agent for authors . . . and its duties were to sell the particular feature for the author and make an accounting to him. ***Under this contract Pearson agreed to indemnify the defendant against damages arising out of libel. . . . Pearson was paid a guaranteed amount plus a percentage of the revenue from sales to newspapers by the defendant. ***The defendant could reasonably anticipate that the sale, distribution and promotion of the Pearson column . . . might entail libel actions as its contract with Drew Pearson for indemnification attests."

Under this contractual arrangement (the contract is Exhibit 21 in this case and material excerpts are attached hereto as Appendix A), Pearson was free to write what he pleased, NANA was under no contractual obligation to investigate the facts, and while it might question Pearson, Pearson had the final authority for column content, and NANA could refuse to publish only in violation of its contract; it was protected by the indemnification agreement.

Because of this situation, the Trial Court ordered counsel for Petitioners to advise whether Pearson was in fact controlling the case as the real party in interest defendent [so that, for example, his "actual malice" would be chargeable to the named defendants below, the Petitioners here], but counsel successfully avoided compliance with this order by reporting inability

to determine the fact (See. T. 1-144 to 155).[1] As a result the indemnification feature of the contract was excluded from jury consideration (T. 8-159, Exhibit 33; T. 8-92, 93). As a further result, the Trial Court held that neither NANA nor Monitor was chargeable with Pearson's reckless disregard for truth or falsity, although allowing both to claim reliance on Pearson as a responsible reporter.

The Petitioner Monitor, unlike NANA, was free to refuse to publish defamation, and was in a position to check the facts alleged by Pearson with regard to New Hampshire matters. Thus the two Petitioners were treated somewhat differently at the trial below.

2. *The jury trial and appeal*:

The cause was tried to a jury, *Morris J.*, presiding, starting on December 5, 1966, with verdicts against both Petitioners being returned after 14 trial days, on December 22. The cause was argued on appeal to the New Hampshire Supreme Court in February 1969, with the decision complained of here resulting.

Statement of Facts

1. *Alphonse Roy's reputation*:

Alphonse Roy, 69 years old when this case was tried (T. 7-62), in September of 1960 had a good general reputation as a realtor and public servant who had held responsible public offices. Born in Canada, he was reared on Manchester's West Side with little formal education, but was self-educated while

---

[1]In seeking an extension of time in this Court counsel for Petitioners notified the Court (Mr. Justice Brennan):

"From the outset of this litigation, Mr. Pearson controlled the action as a result of an agreement by which he undertook to indemnify the petitioners against any judgment that might be entered in favor of the plaintiff, the late Alphonse Roy."

working as a textile mill worker (T. 7-62 to 65). He was elected a Representative to the New Hampshire General Court in 1924, 1926 and 1928. He was elected as Alderman of Manchester, this State's largest city, in 1931; as a member of the Governor's Council (the second highest State elective office) in 1932 and re-elected to that office in 1934. He was elected Congressman in 1936 in the disputed Jenks-Roy election, and was his Party's unsuccessful candidate against Jenks in 1938 and 1940. (T. 7-142).

In 1943 Roy ran unsuccessfully for the nomination for Sheriff of Hillsborough County, in 1944 he ran again and after having apparently won, lost in a recount. He was then, in 1945, named U.S. Marshal for the District of New Hampshire in which post he served two terms until 1953. He then ran unsuccessfully for Mayor of Manchester in 1954 and for Register of Deeds in 1956. In 1958 he was his Party's nominee for Congress, but lost to the Republican in the general election. (T. 7-154).

Thus Roy, in 1960, had been a responsible public officer and Democrat politician for 36 years. He had never been charged with *any* criminal act in his entire life, either as an adult or as a minor. On September 10, 1960 Pearson's column referred to Roy as:

> "a former small time bootlegger".

2. *Genesis of the September 10, 1960 column:*

Pearson threw this charge at Roy in a specially timed column written to assist another Democrat, Herbert Hill, who was a primary opponent of Roy's in a three-man race for nomination as the Democratic candidate for U.S. Senate. The bootlegger charge was wholly false and unrelated to the political story being written, which was also, insofar as it impugned Roy, wholly false. This is what the evidence showed:

In 1960 Roy decided in the spring to become a candidate for the Democratic nomination for Congress, and actually filed for that office on July 18. He subsequently, on July 25 withdrew from that race and filed for U.S. Senate (T. 7-171).

While intending to become a candidate for Congress, sometime before July 6, Roy called Ralph LaVallee to solicit his political support. At that time LaVallee was Superintendent of the Hillsborough County Farm and was Democratic Town Chairman in Goffstown. During the telephone call LaVallee told Roy that Frank Sullivan was at the County Farm, and when Sullivan would be released. Who brought the subject up —Roy or LaVallee—was subject to conflicting memories (T. 7-176 to 185; T. 5-213 to 216).

A small group of Democrats, returning from the National Convention in 1960, decided to get the "best" ticket of New Hampshire candidates possible to assist their Presidential candidate John F. Kennedy (T. 3-26 to 37). They assumed the validity of a thesis that Democrats in New Hampshire must present a "balanced ticket" with a Franco-American, an Irish-American and a Yankee (whatever that is) as candidates for the three top spots of President, Governor and U.S. Senator. Bernard Boutin was their choice for Governor, so, with Kennedy the Presidential Candidate, they needed a "Yankee" candidate for the Senate. (T. 9-44, T. 3-26; T. 4-61). Herbert Hill, an amiable Dartmouth College history professor was the candidate selected.

On the last day for filing, July 28, three candidates in addition to Roy and Hill appeared: all were residents of Manchester (as was Roy), and two at least were Irish by name. All three had minor criminal records. See Exhibits 18, 19. They were Frank Sullivan, one Robinson, and one McCarthy. Frank Sullivan had previously been a candidate for office on several occasions, having been nominated by the Democrats for Congress (T. 6-21 *et seq*); he filed because he disliked Hill (T.

6-53) and thought he could win (T. 6-35, 55). Robinson and McCarthy were political "unknowns".

Professor Hill's campaign manager was Joseph Millimet (T. 3-17, 88) but Joseph Scott was doing the work (4-19). The Hill campaigners reacted swiftly to the influx of "non-Yankee" candidates for Senate.

On July 30 Mr. Millimet filed a petition with the Ballot Law Commission seeking to disqualify Sullivan, Robinson and McCarthy as "straw candidates".

On July 31 the Democratic State Committee was harangued that *Roy* had procured the filing of the "straws", and the State Committee announced that Hill was the only qualified candidate and that the rest (including Roy) were not qualified (T. 9-102 to T. 104, 110).

Sometime shortly after July 28 (presumably before August 4) Mr. Scott *claimed at this trial* to have met Sullivan on Elm Street in Manchester and to have chided him for having filed; whereupon, according to Scott, Sullivan pulled out a roll of bills as big as a man's fist and said "Well, see what I got for it", explaining that Roy paid him to file as a straw (See T. 4-129 to 134). [Scott had never told this before (T. 4-132, 134) and Sullivan emphatically denied the story (T. 6-36, 37)].

Mr. Millimet tried the Ballot Law Commission proceeding August 3 and 4, without calling Mr. Scott, although attempting to prove that Sullivan and the other two were straws, and believing that Roy had arranged their filing (See Exhibit 12, T. 3-47 to 80, 95, 96, 119, 120, 130).

The ballot Law Commission ruled Robinson and McCarthy off the ballot as straw candidates, but left Sullivan on, so that the final slate of candidates consisted of Hill, Roy and Sullivan [and they finished in that order, with Senator Bridges defeating Hill in the general election].

The Democratic State Committee's endorsement of Hill on July 31, Roy's reply in kind castigating the State Committee and Hill, and the Ballot Law Commission's hearings and rulings received wide attention in the New Hampshire press, all *during the period July 30 to August 5* (See Exhibits 11, 13, D, E, F).

Some three weeks later Drew Pearson telephoned Manchester trying to locate someone in the Hill campaign to inform him whether a Fulton Lewis report that Kennedy was financing Hill with Fifty Thousand Dollars was true (T. 4-10, 11). Scott called back August 24 (T. 4-53; 5-35), said Lewis was wrong, and told Pearson substantially all of the falsehoods concerning Roy of which complaint is made here, except the call to LaVallee; that is, in addition to the "bootlegger" report, he told Pearson that Roy had procured the straws including Sullivan, and was assisting Bridges in this effort. Scott said also that he told Pearson *he had no evidence* that these "straw" charges were well-founded (T. 4-56 to 65).

Pearson and Scott made an agreement that Scott would supply Pearson with a copy of the Ballot Law Commission proceedings (T. 5-20). Millimet had previously insisted upon introducing the "criminal" records of Sullivan, Robinson and McCarthy as part of that record (T. 4-32). And, although Mr. Millimet never discussed with Scott what Scott was doing with Pearson (T. 4-28 to 30), Scott supplied Pearson with the Ballot Law Commission transcript and photocopies of Millimet's copies of the criminal records (T. 5-37 to 39, compare Exhibits 18A and 19A with 18B and 19B). Thus Pearson was given *record verification* of the criminal records of everyone adversely commented on except Roy, and of the "straw" candidate controversy which resulted in Sullivan *not* being found to be a straw.

Pearson called Scott a second time August 25 or 26 (T. 4-136) and Scott repeated the charges (T. 5-22 to 24). Pearson

called Millimet between August 24 and August 27 (T. 5-44), and Millimet probably discussed "ticket balancing", Hill's chances, and the Ballot Law Commission proceedings (T. 5-44, 45; T. 3-90 to 96, 177 to 180) but said nothing about the LaVallee call, or "bootlegging", because he knew nothing of either (3-15, 16). If he discussed the "straw" and "Bridges" counts with Pearson *he warned Pearson that he had no facts to prove them* (3-95, 96; 178).

Pearson knew and recognized that the sources for this anti-Roy defamation were Hill's poltical managers (T. 5-20, 61). His assistant talked to Senator Bridges but got no information (T. 4-12).

Pearson also called Ralph LaVallee between August 24 and August 27, and injected Bridges' name into the call as indicated in the published column (T. 5-59). LaVallee and Roy were both emphatic, as was LaVallee to Pearson, that Bridges' name did not come up (T. 5-216; 7-185). There was evidence that national columnists "throw in a big name to attract attention", and that Bridge's name would attract attention to the column whereas Roy's name would not (T. 9-48 to 50).

With *possibly* a further talk with one of his staff men, Fernsworth (T. 5-15 to 17, 48), this was Pearson's investigation of the "straw" and of the "Bridges" counts, and the story was complete August 27. He did not know Scott, Millimet, or LaVallee who were the informants. *He did not check Scott with anyone insofar as the "bootlegger" charge was concerned, and Scott was the sole source of this lie.*

Although the supposed facts were at hand not later than August 27, the story was not written up until September 7, and *was specially timed for publication September 10 "just before the election" of September 13 (T. 5-72, 73). Thus there was a period of 11 days available for checking the facts without impairing the "hot news" value of the libel.*

3. *The bootlegger charge was private factual libel*:

In its opinion below, the New Hampshire Supreme Court correctly synopsized the evidence on the false bootlegger charge, and its view of the issue, as follows (See pp 16-17 of Petition):

> "The evidence fails to reveal that any prosecution for criminal activity of any kind was ever brought against Alphonse Roy. His only brush with the law was in January 1923 when he was taken to the police station after a raid when he was present in a near beer parlor run by his brother. He was not charged with any violation and was released. This was 37 years before the publications here in question. Since prohibition ended in 1934, it is not probable that the bootlegger statement would be understood to refer to any activity within 26 years of the publication. Although there was evidence that there were rumors in the mid-twenties that plaintiff was a bootlegger, it was findable from the evidence that these had died out before he was elected to the Executive Council in 1932.
>
> "Although engaging in criminal activity even such as small-time bootlegging might be difficult to exclude from those things which affect fitness for office if it were alleged to have occurred recently its inclusion as a matter of law becomes less clear with the passage of a long period of time.
>
> "We are of the opinion that small-time bootlegging activity which occurred some 26 or 37 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, and the jury must have so found when they determined the defamation to have been a private one."

The evidence not only warranted the jury's conclusion, it virtually required it. Pearson was specific that *"this was reported as a fact, yes"* (T. 5-100), so was Monitor's publisher Jim Langley (T. 2-188). Pearson intended to make *"a factual statement"* (T. 5-102), as distinguished from an editorial comment. He had received this false information by telephone from Scott, whom he had never met and did not know (T. 5-47), and he made no check to verify the report before publishing the information (T. 5-48, 62), *and didn't call Roy to confirm or deny because he expected Roy would deny it* (T. 5-61). Although Pearson had the false information about August 24-26, (T. 5-35), he deliberately delayed publication, and timed release just "before the election" (T. 5-72, 73).

"Bootlegging" was intentionally used and was understood to mean illegal trafficking in liquor during the Prohibition era (T. 5-57, T. 2-175, T. 5-203; T. 6-112, 114, 120; T. 7-24). It was thus a charge of criminal activity. It in fact damaged Roy's reputation, being widely discussed and circulated (T. 2-189; T. 4-142; T. 5-191 to 195; T. 6-88 to 118, 120, 122; T. 7-47, 48, 52 to 56). It also caused Alphonse Roy personal chagrin, shame and mental distress (See T. 7-201 to 220):

> "I was ashamed of myself. I hated to face people, having in mind that people knew that once upon a time I was a bootlegger . . . and I felt that this article . . . had succeeded to poison the minds of thousands of people, and I was really run down and I was hurt, and I felt that way for a long time." (T. 7-219).

Argument

I

The Decision Below Correctly Applied New York Times v. Sullivan to The Facts Shown In This Case.

The narrow issue sought to be reviewed here is succinctly explained and stated in the decision below (Petition, p. 15):

"The case was tried on the basis that since he was a candidate for the United States Senate, publications about Roy would come under the same constitutional protection as where public officials are involved under *New York Times v. Sullivan*, 376 U.S. 254. However, the Trial Court instructed the jury that if they found that the bootlegger publication was a public affair on a par with official conduct of public officials, they were to return a verdict in favor of NANA, and that in considering the case against Monitor they should follow instructions based upon the New York Times rule. He also instructed the jury, that if they found that the bootlegger publication would not touch upon or be relevant to Roy's fitness for public office 'but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector' and that they should consider the claim against both defendants under the law relating to private libels. The verdict against NANA shows that the jury found the publication to be in the private sector, for under the charge if they found otherwise, they were directed to bring in a verdict in favor of NANA.

"The main issue in the case as it comes to us, therefore, is whether the bootlegger part of the publication could be found to be a purely private defamation and outside the constitutional protections of the New York Times rule which permits recovering only on proof that the publications were knowingly false or that they were false and were published with reckless disregard of the truth."

The specific point at issue here is whether, *in this instance* publishing an unverified, false, obviously defamatory charge of criminal conduct which was thirty to forty years old, against a candidate for public office, was a publication in good faith for a justifiable purpose, or whether it was a publication under

mere color of a lawful occasion, without good faith, where the protestation of acting for a justifiable end is made as a cover and pretense to publish and circulate defamatory material.

> "Where, however, there is mere color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter. . . he is liable in the same manner as if such pretense had not been resorted to." (*State v. Burnham,* 9 N.H. 34 at 41, 42, charged in this case at T. 10-147).

This is a question of fact, and was correctly left to the jury's determination.

The jury found that the bootlegging charge was not relevant to Roy's fitness for office, but rather a bringing forward of a long forgotten false rumor in which the public had no interest. The evidence fully justifies that finding. The single fact that FBI checks on Roy in 1945 and 1949 in connection with his being appointed to the post of U.S. Marshal developed no reason to recommend against his appointment to that responsible law enforcement post, justifies the jury's conclusion, see T. 9-117 and T. 7-154 where Attorney Millimet says "*it wasn't a serious thing,* so they would have recommended"!! The witness William Moher, presented by the defense, acknowledged that such rumors as existed 43 to 44 years ago were not current in the 1930's but had died out "long before that". Scott and Shenton, who testified to the contrary were demonstrated to be unworthy of belief, on this and on other items of testimony. The fact that Earley, Suosso, Thirsk, Gauthier, Ryan, Gay and Millimet knew of no such rumors over a period that covers 1926 to 1960 is indicative that no one considered over all these years that there was sufficient substance to the rumor to warrant using it openly. The fact that it was never reported in print, in spite of the 1936 Roy-Jenks battle and the

1944 Sheriff's race, is good evidence that there was no situation here that made this stale rumor relevant to Roy's qualifications for public office.

We would further invite to the Court's attention, that there was no relevancy to publishing the "bootlegger" charge in the September 10 column itself. The thrust of the article, as it related to Roy, consisted of repeating the already disproven charges that he arranged Sullivan's release from jail to run as a straw candidate, together with other straws, as a favor to Bridges in 1960. That story could have been told without throwing in the further gratuitous insult of the bootlegger charge. The bootlegger charge is foreign to the balance of the story, and constituted only a malicious defamation of one of the actors — Roy. (See T. 8-209 to 211). Journalistically, Pearson was discussing others with criminal records, and, to put Roy in the same category, created a criminal record for Roy. See Pearson's explanation, T. 5-56 to 58:

> "I deliberately put in the word 'later'—'later U.S. Marshal'—because in the old days there were many people who were bootleggers. I know some very respectable big liquor dealers today, millionaires, who were bootleggers, but they've gotten over it, lived it down. . . . Here Roy, apparently, if he became a United States Marshal, it was not held against him".... (T. 5-57).

This lame explanation by Pearson would justify the conclusion the jury reached on this issue. Even *he* assumed that the bootlegger charge was irrelevant to the 1960 campaign, but he used it, for no justifiable purpose, in reckless disregard for whether it was true or false, solely to defame Roy.

II

A False Report Of Bootlegging In The 1920's, Made In Disparagement Of A Political Candidate in 1960, May

Properly Be Found To Be Out-Side The Boundaries Of The "Official Conduct" Concept Of New York Times v. Sullivan.

Petitioners do not dispute that the evidence justifies the jury finding; they argue that *Times v. Sullivan,* 376 U.S. 254 (1964), hereinafter referred to as *New York Times,* precludes there being any factual issue. Essentially the Petitioners' position is that if a man stands as a candidate for U.S. Senate *anything* anyone writes about him is privileged. We do not so understand the law.

For the purposes of trial of this case, plaintiff's counsel agreed that Roy as a candidate was within the general concept of "public official" as conceived in *New York Times,* but at no time did the plaintiff's counsel agree that the *New York Times* rule governed the case. (See T. 1-94, 95, T. 3-116). This Court had not yet ruled that candidates for public office were within the "public official" concept, rather than being "public figures" as conceived in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, (1967), but we preferred not to be required to try the case again should this Court go that far.

The *New York Times* rule, however, has two requirements. It is only defamation (1) of a "public official" (whatever that may mean), (2) concerning his "official conduct" (whatever that may mean), that is protected. The type of publication toward which the constitutional protection is extended is "*criticism of official conduct.*" The rule is:

> "A public official [cannot recover] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or true." (376 U.S. at 279, 280).

In footnote 23 (376 U.S. at 283) the Court goes on to say:

> "We have no occasion here to determine [1] how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule. . . . Nor need we here determine [2] the boundaries of the 'official conduct' concept."

Thus it is made clear that there are limits to both branches of the *New York Times* rule, and that *"there are boundaries" of the "official conduct" concept.*

Our case of *Baer v. Rosenblatt,* 106 N.H. 26 (1964), was reviewed on certiorari for the express purpose of further defining the concept of "public official", *sub nominee Rosenblatt v. Baer,* 383 U.S. 75 (1966) (see footnote 12), without any consideration being given to the "public conduct" concept, because the libel was obviously related to Baer's supposed conduct in the employment he held. The case was remanded for trial because on the record already made, it was apparent that *the case might fall outside of the New York Times rule,* and that even if it were governed by the *New York Times* rule "respondent may be able to present a jury issue of malice as there defined" (383 U.S. 87). The Court went on to "remark" that it was for the trial judge "in the first instance to determine whether *the proofs show* respondent to be a 'public official' (italics added)."

After remand, the case came again before the New Hampshire Supreme Court for decision, in *Baer v. Rosenblatt,* 108 N.H. 368 (1967), on the question whether the issue of "public official" was triable to the "trial judge" or to the jury, since plaintiffs have the right to jury trial of defamation actions under the Constitution of New Hampshire. The New Hampshire Court held that the issue was one of fact, and consequently was for the jury (108 N.H. at 370). The Court went on to rule, correctly, that *"The burden of establishing a privileged occasion is upon the defendant,* Prosser, Torts (3d ed) *s.* 110."

Now, if proof of the existence of a "public official" status is

factual, it seems equally clear that whether or not a false defamatory publication is within or outside of the "boundaries" of reports of "official conduct" is similarly an issue of fact to be decided on evidence.

Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579 (1967) was disposed of by the Fifth Circuit precisely in this manner, and certiorari was denied by this Court on October 14, 1968 in No. 96, *Orlando Daily Newspapers, Inc. v. Belli.* In the *Belli* case the defendants published in a gossip column (Is Pearson's column anything else?), a 9 year old false story that Belli had "taken" the Florida Bar Association by charging hundreds of dollars worth of clothing to his hotel bill, which the Bar Association had agreed to pay in consideration of Belli's appearing on a panel at its meeting. Among the defenses asserted was the claim that Belli was a "public figure" (which was acknowledged by the Court) and that the item qualified under *Sullivan* and *Butts* as comment on his "official conduct." The Fifth Circuit reversed a lower court dismissal, and remanded the case for trial to jury. *Wisdom, J.*, speaking for the Court, said:

> "Not only must Belli be considered a public figure before the defendants can avail themselves of the *New York Times* privilege; *the matter covered by the publication must be of legitimate and substantial public interest. Thus a court* confronted with a defamation suit in which the defendant asserts the New York Times privilege *is compelled to make a dual inquiry* (1) whether the plaintiff is a public figure and (2) *whether the alleged defamatory publication is directed toward his public conduct****We conclude, therefore, that *the trial court is the proper arena for development of the relevant facts and resolution of the crucial issues in the first instance.*" (389 F. 2d 587, 588, italics added).

The Court went on, by footnote 15, to cite *Rosenblatt v. Baer's* "remark" as authority for this disposition.[2]

Insofar as this Court's "remark" in the *Baer* case that it is for the "trial judge" "in the first instance" to determine the issue is concerned, the "trial judge" in this case did so: he determined in the first instance that *findably* the "bootlegger" charge was not relevant to Roy's candidacy, and correctly left it to the jury to determine *on the facts* whether or not the charge did bear on Roy's fitness as a candidate. This is the correct disposition of a disputed fact issue.

Plaintiff's position was made known at the outset below that there was no useful purpose in publishing in 1960 false gossip about a man in 1920 or 1930, and the relevance of Pearson's doing so to the issue of malice that destroys privilege was pointed out, (See T. 1-24), and maintained throughout trial (See T. 8-209 to 211, R.C. 18-12 to 26). The defense posture itself recognized that this was a dragging in of an irrelevant matter so old as to be without significance (T. 1-111, 112; see also T. 1-88; T. 7-84, 142), and Langley could think of no relevant purpose for this aspect of the publication (T. 2-161).

This particular aspect of libel law—"the color of lawful occasion" subterfuge of character assassinators—has not yet been directly reviewed by this Court. In *St. Amant v. Thompson*, 390 U.S. 727, which is the most recent decision in the field, there is language which indicates that this Court recognizes that irresponsible publishers will take such advantage and

---

[2]In addition to *Belli v. Orlando Daily Newspapers, Inc.*, the following cases similarly appear to recognize a factual issue as to the extent of the "official conduct" concept of *New York Times v. Sullivan*: *St. Amant v. Thompson*, 390 U.S. 727; *Goldwater v. Ginzburg*, 261 F. Supp. 784 (S.D., N.Y. 1966); *Tucker v. Kilgore*, 388 SW 2d 112 (Ky. 1964); *Eadie v. Pole*, 91 N.J., *Super* 504, 221 A2d 547 (1966); *Keogh v. New York Herald Tribune, Inc.*, 51 Misc. 2d 888, 274 NYS 2d 302 (1966); *Cabin v Community Newspapers, Inc.*, 27 App Div 2d 543, 275 NYS 2d 398 (1966); *People v. Mager*, 25 App Div 2d 363, 269 NYS 2d 848 (1966).

attempt to claim *New York Times* protection, and that in such cases the jury need not believe their protestations. The following excerpt, we feel, applies generally to this case:

> "*The finder of fact must determine whether the publication was indeed made in good faith.* Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call." (390 U.S. at 732, italics added).

Here we see this Court recognizing the *good faith* of the publisher of libel is a question of fact, and that his professions of good faith need not be believed.

This case is a good illustration of the usual situation that prompted the New Hampshire Court as early as *State v. Burnham,* 9 N.H. 34 and *Palmer v. Concord,* 48 N.H. 211, to recognize that the existence of a "lawful occasion" to publish depends upon the actual, factual *motives* of the publisher:

> "*A court cannot rule* that a communication is privileged without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith, for a justifiable purpose. . . ." (*Palmer v. Concord* at 217).

This rule has been uniformly followed in New Hampshire through *Lafferty v. Houlihan,* 81 N.H. 67 to *Baer v. Rosenblatt* 196 N.H. 26. While *New York Times* carved out an area—"official conduct of public officials"—where it superimposes its First Amendment protection—in point of fact no case has yet been presented to this Court in which the existence of the lawful occasion on which the privilege is based was challenged. This case is therefore of first impression insofar as that aspect is concerned.

If we assume, *arguendo*, that Pearson's retelling the story of the straws and Bridges was germane to the 1960 campaign as a report (albeit a false one) of Roy's official conduct as a public candidate, and that the motives of the publishers were to "prevent the election of an unsuitable person to office" (*State v. Burnham* at 41), that does not answer the further question whether bringing forward a stale false rumor of bootlegging was also germane. Roy's conduct *as a candidate in 1960* may be admitted to be "official conduct" under *New York Times*. His supposed conduct as a private citizen in 1923 was as clearly not official conduct. Throwing the false 1923 "bootlegger" charge into the 1960 story was needless, heedless and not germane either to the 1960 campaign or to the story being told. As Mr. Justice Fortas said dissenting in *St. Amant v. Thompson*, 390 U.S. at 734, in another connection:

> "The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. ***The public official should be subject to severe scrutiny and to free open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy at law. *New York Times* does not preclude this minimal standard of civilized living."

Roy was, in this case, "needlessly, heedlessly, falsely accused of crime." Needlessly because the charge was not germane to the 1960 issues or to the story being told; heedlessly because neither petitioner concerned itself with the truth or falsity of the charge, and falsely on the evidence and finding of the jury.

The writ should be denied.

III

Appellant's Prayer That This Court Summarily Reverse The Judgment Below Concurrent With The Issuance Of The Writ For Which Application Is Made Is Improper.

The New Hampshire Supreme Court sustained the verdicts as proper on the jury finding that the "bootlegger" publication was a private libel, and therefore refrained from reviewing, *as moot*, Roy's contention that the record includes sufficient proof of "actual malice" under the *New York Times* doctrine to sustain verdicts even if the publication were found or held to have been in the public sector.

The record contains ample such evidence, and therefore, even if the judgments being reviewed were thought to be improperly based on the private sector rationale, they should not be summarily reversed, since they are sustainable alternatively because in the trial a sufficient showing of "actual malice" was made out, and on a new trial would be provable again. This aspect of the case is fully presented in Respondent's brief to the New Hampshire Supreme Court at pages 19-33.

This case differs from *New York Times v. Sullivan* and its progeny in that the writer here, instead of being an employee of the publisher to the public (Monitor) was an independent columnist distributing his material through a corporate feature syndicate.

It should be noted that this Court has not yet considered the writings of syndicated columnists in the *New York Times* context. It has held corporate publishers responsible for the malice (i.e., reckless disregard) of employees, and has discussed the reckless disregard of the employee-writer as the reckless disregard of the corporate publisher in *New York Times v. Sullivan, Butts, Walker,* and *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967). Does the syndicated columnist stand any differently? We say not.

The evidence in this case is clear that NANA had a right to question libel before publishing it, and that newspaper subscribers such as the Monitor had the right to decline to publish

libel sent to them by NANA. The evidence is also clear that Pearson controlled the content of the column and indemnified the Petitioners against libels originating with him. That Pearson and NANA were joint venturers in the sale of the column is apparent from the contract which is Exhibit 21.

Under these circumstances, when these Petitioners assert a conditional privilege to defame, the malice of the writer, Pearson, defeats the claimed privilege, and in that sense *is* imputed to the publishers, because the publishers are jointly liable with the writer. See Annot. 10 ALR 672 (1921).

> "Whenever two or more persons cooperate in the publication of a libel, all are responsible for the resultant damage. . . . ***But of course, there must be some degree of concert between the defamers; if they acted independently, they are not liable jointly.***
>
> *"Where the liability of one person for a defamation published by another is predicted upon the rule of respondeat superior, as in the case of master and agent, or principal and agent, the parties are jointly liable."*

33 AM. JUR., *Libel and Slander*, § 198 at 186-88 and authorities cited; and see *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260.

The release of the September 10 column to the newspapers by NANA constituted a ratification of Pearson's acts in writing it, and since NANA and Pearson were joint venturers, NANA is legally chargeable with Pearson's reckless disregard. *See generally, Annotation, Liability of Master Or Principal For Servant's Or Agent's Libel*, 150 ALR 1338, 1349 (1944).

Pearson, referred to as the "Garbage Man of the Fourth Estate" in other litigation (*Pearson v. Fairbanks Pub. Co.*, 413 P 2d 711 (Alaska 1966) is not an apparently reliable source of information, nor is his column comprised of purely news items. Insofar as NANA is concerned, Pearson himself testified that *questions of libel arise almost daily* with regard to this

column, so that the New Hampshire Court correctly commented that this Petitioner *"could reasonably anticipate"* that libel actions would arise from its sale and distribution of the column (106 N.H. at 97-98). In this instance the "bootlegger" charge was a "red flag" appearing on the face of the matter published which cried out for verification in order to guard against obvious injury if the report were published and proved false. Hence the exception to the general rule illustrated by *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, 86 ALR 466 (1933) has no application here.

We would therefore urge, if the writ issues, that this Court rule that Pearson's malice (i.e. his reckless disregard) be charged to his indemnified agent NANA.

The importance of this point lies in the fact that professional character assassinators such as Pearson, operating behind buffers such as NANA, deprive plaintiffs of local jurisdiction for suit, except suit against the local newspapers and NANA, as was the situation here. If the system of dissemination of libel used here is allowed to insulate both the writer and publisher, by compartmentalizing the conduct of each member of the disseminating group, justice is defeated.

The reckless disregard of the writer *plus* the reckless disregard of NANA are chargeable to NANA. The reckless disregard of both Pearson who wrote it and NANA who distributed it are chargeable to the Monitor which published it, in addition to the Monitor's reckless disregard. The situation here is no different than the products liability situation of the manufacturer, distributor and salesman of a defective appliance that causes harm. The original defect (false defamation recklessly written) of Pearson, uncorrected by NANA (which could have but did not insist upon deletion), and uncorrected by Monitor, (which could have but didn't verify) all contributed to cause the harm: since Pearson and both Petitioners acted in concert, they are all chargeable with the liability acts of each

other, and Pearson's reckless disregard is chargeable to both Petitioners.

We contrast this case with other recent cases in the *New York Times v. Sullivan* line assuming that Pearson's conduct was properly chargeable to these indemnified Petitioners below:

In *New York Times v. Sullivan* the publisher of defamation was excused from liability because it relied upon the "good reputation" of endorsers of the ad *who were known to it,* the ad not being obviously defamatory of any individual.

New York Times v. Connor, 365 F 2d 567 (1966) excused the publisher of defamation, commenting that Salisbury (the writer) had relied on one or two persons as sources for each item, and *did* contact persons of differing points of view, and made a conscientious effort to contact Connor and others on the opposite side.

In *St. Amant v. Thompson,* 390 U.S. 727 (1968) St. Amant, who uttered the defamation over television quoting one Albin, had known Albin for months, had verified other aspects of the Albin information and had affidavits from others. Albin had given St. Amant a written affidavit and had sworn to his answers before newsmen, saying he was prepared to substantiate what he said.

In these three cases, this Court and the Circuit Court saw no evidence of reckless disregard.

In *Rosenblatt v. Baer,* the writer Rosenblatt telephoned a CPA and Chairman of the Belknap Area Commission, whom he knew, and got data on which he claimed he wrote the defamation; this Court said of this case "respondent may be able to present a jury issue of malice as [defined in *New York Times*]", 383 U.S. at 87, and remanded the case for trial.

In *Goldwater v. Ginzburg,* 261 F. Supp. 784, 787 (S.D. N.Y., 1966) the District Court remanded the case for trial say-

ing that there was evidence on which malice could be found by the jury, including the fact that:

> "Ginzburg had information about the "nervous breakdowns' . . . from one source only, and did not know whether or not the source had the information from personal knowledge."

In *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 157 the publisher of defamation relied on the affidavit of an informant who had overheard a telephone conversation "without substantial independent support", and this Court upheld the plaintiff's verdict on the basis that the "slipshod and sketchy investigatory techniques employed in checking the veracity of the source" constituted "reckless disregard" in the opinion of the then Chief Justice, or a "departure from standards of press responsibilities" severe enough to cause loss of constitutional protection, in the opinion of Mr. Justice Harlan.

In these latter cases, issues of fact were acknowledged to exist, even though First Amendment protection was involved.

The instant case, insofar as Pearson's conduct is concerned, is in the latter category with *Baer, Goldwater,* and *Butts.*

Pearson here relied, for the bootlegger charge, on two telephone calls to a person whom he did not know, had never met, and whose reputation for truth and veracity was totally unknown to him. In this trial we have demonstrated that the informant, Scott, is not credible. On the contrary, he fabricates at will.

Pearson knew Scott was a biased source. *He knew also that Scott was prone to make charges with regard to which Scott had no proof,* since Scott told him he had no proof on the "straw" and "Bridges" charges. He therefore called Millimet to verify Scott on the "straw" and "Bridges" charges, and again was told *there was no proof* that Roy was involved.

Pearson was then supplied with the Ballot Law Commission transcript and the criminal records of Sullivan, Robinson and McCarthy, *but no proof that Sullivan was a straw, or that Roy had procured his filing, or that Bridges was involved.* He published the straw and Bridges charges just the same, and this, we submit, is reckless disregard for whether the charges were true or false.

With regard to the bootlegger charge, Pearson's reckless disregard is even more obvious, since he had no verification at all and sought none. In contrast to Salisbury in *Times v. Connor,* who sought to get the other side by trying to contact Connor, Pearson *deliberately* failed to contact Roy:

> "From long experience . . . if he's in an embarrassing position, he usually denies it." (T. 5-61).

Failure to check sources, "or such failure to check for the purpose of avoiding finding of the truth" constitutes "reckless disregard" in the constitutional sense. *Cepeda v. Cowles Magazines and Broadcasting, Inc.* 392 F 2d 417, 420 (1968), *cert. denied,* Oct. 14, 1968, No. 256.

We respectfully submit that the evidence on Pearson's conduct in writing and placing in circulation this libel, and particularly the "bootlegger" charge, makes it clear that he wrote with reckless disregard for whether the charge was true or false. He needlessly, heedlessly and falsely defamed Roy "wholly" on information no more reliable than "an unverified anonymous telephone call", *St. Amant v. Thompson,* 390 U.S. at 732.

It is settled law that one who publishes a libel originally uttered by another cannot escape liability on the ground that he merely republished what he received from a third party. *RESTATEMENT,* TORTS, § 578. *New York Times v. Sullivan* does not purport to change that rule. *St. Amant v. Thompson* endorses it.

If the recklessness of Pearson alone is not enough, there is further proof of further recklessness as the libel was processed through NANA and the Monitor.

"Recklessness" is the language of both negligence and criminal law. Petitioners' counsel recognized this below when he posed the question:

> "How careless can you be and still not be recklessly disregarding the truth or falsity of a matter?" (Millimet at T. 8-527).

Defense counsel below also recognized that if NANA relied entirely on its indemnity agreement with Pearson, it would be *findably* recklessly indifferent to the truth or falsity of the defamation (T. 8-204, 5).

How careless can you be without being in reckless disregard? The general law is that you must take *some* care to avoid liability, and a *complete absence of care, or concern,* is what reckless disregard is. The opinions of Mr. Justice White and Mr. Justice Fortas in *St. Amant* make it abundantly clear that *no care* is *reckless disregard*—and the record here indicates no care exercised by NANA.

Plaintiff in this case was prevented from discovering what, if anything, NANA actually did with regard to questioning the article, when NANA's refusal to answer interrogatories directed to this phase of the case was upheld by the Superior Court on the basis that these were matters of defense (T. 193 to 203; T. 10-56). At the trial, defense counsel, reversing the field, produced no evidence on this point, taking the position that the plaintiff had the burden of proof in this area.

As a result, there is no evidence that NANA, although entitled to question Pearson, did so, but there is evidence that NANA did, in this matter and generally, rely on its indemnity agreement. It is also the evidence that the "bootlegger" charge in the article was obviously, on its face, defamatory, and

sufficiently so that any newspaperman would have recognized that it should not be published without verification (See T. 6-131 to 204, T. 9-189 to 216). And, as the New Hampshire Supreme Court observed on the prior transfer, NANA not only *could* reasonably anticipate libel from Mr. Pearson's column, but *did* and protected itself from that danger by the indemnification agreement.

We say that from these facts alone the jury should have been allowed to find reckless disregard, and would have so found if the fact of the indemnification agreement had been made known to them.

This particular factual situation, of the writer of material known to have a potential for libelous defamation indemnifying the agencies which distribute and publish it, and being in position to limit the distribution agency's right both to investigate the facts or to decline to distribute the material, has not been considered by this Court.

Everything that has been argued above with respect to NANA's reckless disregard applies equally to the defendant Monitor. It too could have questioned Pearson; but it was additionally at liberty to refrain from publication, and was in position to verify the report. This latter factor apparently satisfied the Trial Court that the Monitor's failure to act was more reckless than NANA's similar failure.

New York Times v. Sullivan does not hold that failure to investigate cannot supply the evidence of reckless disregard. It held that *in that case* which involved a publication not defamatory of any individual on its face, and with responsible endorsers, failure to investigate *in itself* was insufficient proof. *St. Amant* says no more, and adds:

> "Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (390 U.S. at 732).

Mr. Justice Fortas, dissenting, observed:

> "Petitioner had a duty to check the reliability of the libelous statement about respondent. If he had made a good faith check, I would agree. . . . But . . . he made no check. . . ." (390 U.S. at 734).

From Monitor's vantage point there were obvious reasons to doubt the accuracy of the September 10 column. It reported that Sullivan was a straw, and the Monitor knew Sullivan had been cleared of that charge. The column also reported that Roy had procured Sullivan as a straw, which the Monitor also knew had been disproved. The Monitor also knew that the charge that Bridges was implicated was untrue. And it knew that Roy had political credentials other than being "a former small-time bootlegger and later U.S. Marshal." Consequently it knew Roy was at least being disparaged, and being falsely accused of the straw and Bridges charges. These facts, independently of the obviously defamatory "bootlegger" charge itself constituted "obvious reasons" to doubt the accuracy of the column as it referred to Roy. This situation raised a duty to investigate before publication of an obviously defamatory report.

The fact that one New Hampshire editor, faced with the obviously defamatory column, and not being willing to investigate, did not publish it, and that another, by merely telephoning, was able to satisfy himself that the bootlegging charge could not be sustained, (See T. 6-131 to 204; T. 9-189 to 216), is some evidence that *minimal care* would result in non-publication. Both of these editors also testified that where an item is *obviously defamatory of an individual*, and the report cannot be substantiated, it is not published. Monitor's publication without verification under these circumstances is reckless disregard.

In *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 392 F. 2d 417, 420 (1968), *cert. denied* October 14, 1968, No. 256, the Ninth Circuit approved a charge on actual malice as meeting the *New York Times rule*, which

> " . . . included in the concept of malice, reckless or heedless failure to check sources of information, or such failure to check, for the purpose of avoiding finding of the truth."

That Monitor's failure to check was reckless or heedless was findable because of the witness Shenton's testimony that attempted to demonstrate that there was reason to accept the report at the time without checking, which the jury had ample reason to believe was fabricated. Langley said that if there were anything "questionable" in the column Shenton had the duty to delete it. Shenton feigned actual recollection of processing the particular column (which was disproved), and attempted to excuse himself for not recognizing the necessity for checking it by (1) denying that he recognized the defamatory nature of it and (2) by making incredible testimony that *he* had long heard it rumored that Roy *was* a bootlegger. These "protestations of good faith" (*St. Amant*) proved unpersuasive, in light of the abundant credible evidence that no such rumor of bootlegging existed at the times and places he recited; and the defamatory nature of the charge was obvious to everyone.

In summary, insofar as Monitor's reckless disregard is concerned, the evidence was that an obviously defamatory column was received, and published, with no concern at all being given to whether it was true or false, in circumstances where the jury was entitled to find that this corporate Petitioner's agent "in fact entertained serious doubts as to the truth of his publication", and his "professions of good faith" in the face of the "obvious reasons to doubt" the accuracy of the report,

were not persuasive. This is reckless disregard for whether the report was true or false. *St. Amant v. Thompson,* 390 U.S. 727, 732.

Conclusion

We submit that the decision of the New Hampshire Supreme Court correctly ruled that the jury's finding that the "bootlegger" libel was a private libel outside the "official conduct" concept of *New York Times v. Sullivan* was proper on the evidence in this case. For that reason, the writ should be denied. But if the writ issues, the Court should review *Respondent's* contentions that Pearson was shown to have written the libel with "actual malice" which was chargeable to these Petitioners, and which would sustain the verdicts if the bootlegger charge is held to be subject to the *New York Times v. Sullivan* requirements.

Respectfully Submitted,

Bois, LaFlamme & Kalinski, and
McLane, Carleton, Graf, Greene
& Brown by
Stanley M. Brown,
Attorney for Respondent
40 Stark Street
Manchester, New Hampshire

APPENDIX A

Excerpts from Exhibit 21, an agreement between Drew Pearson and Bell Syndicate, Inc., which, it was stipulated below, was in force at the time of the libel, North American Newspaper Alliance, Inc., having succeeded to the interest of Bell Syndicate, Inc.:

MEMORANDUM OF AGREEMENT made this 14th day of June, 1956 between Drew Pearson of Washington, D. C., hereinafter referred to as "the Author" and The Bell Syndicate, Inc., a corporation organized under the laws of New York, hereinafter referred to as "the Syndicate".

FIRST: The Author agrees to write and deliver or cause to be delivered to the Syndicate seven (7) columns each and every week during the period of this Agreement, and any renewals thereof, of the same standard and quality as the column heretofore written by him under the title "Washington Merry-Go-Round" on local, national and world events and affairs, economically, politically and otherwise and grants to the Syndicate the exclusive first publication rights thereto in newspapers throughout the world.

SECOND: The Syndicate agrees to devote its best efforts to secure newspaper publication of the column throughout the world and agrees to pay to the Author. . . . in weekly or monthly installments as the Author may direct.

FOURTH: The Syndicate agrees to file the daily releases for copyright at its own expense in the name of the Author and all property rights in the column, other than the first publication rights in newspapers, shall belong to the Author.

FIFTH: The Author agrees not to release anything for publication in the newspapers directly or through any other syndicate or agency during the period of this agreement without permission of the Syndicate.

EIGHTH: It is understood and agreed that the Author is to indemnify and hold harmless the Syndicate against all court costs, damages and judgments incurred by it by reason of the publication of the column arising out of infringement of copyright, libel, violation of civil rights or other legal liabilites, but that each party shall defray their own attorney's fees in the defense of any suit, provided, however, that the Author shall have the right at his discretion to retain legal counsel to defend the Syndicate, at his own expense.

NINTH: This agreement shall be in force and effect for a period of five (5) years from the 13th day of December 1957, with the understanding that after the expirtaion of the first two (2) years of this agreement, that is, after December 12, 1959, if the gross sales of the column, at any time, not be sufficient to protect the Syndicate against loss in producing and handling the column, then and in that event, the Author agrees to reduce the amount guaranteed by the Syndicate to such extent as to protect the Syndicate against loss during the balance of the term of this agreement. In this connection, the cost of handling and producing the column to the Syndicate shall consist of the cost of postage, wire time and stenciling; but it is understood and agreed that these costs shall not include editorial work or any administrative or selling costs incurred by the Syndicate. It is further provided that upon the giving of ninety (90) days notice by the Author to the Syndicate, the Author may terminate this contract on the first day of said year which succeeds the preceding year in respect of which the Author has received....

TENTH: The Author shall have the right to assign this contract to a partnership or company in which he is the dominating person or controlling shareholder. Such assignment shall not relieve the Author of his liability under the contract.

In witness whereof....